

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kerry L. Robinson,
Plaintiff,

v.

Fred Meyers Stores, Inc.; United Food &
Commercial Workers Local Union 99,
Defendants.

CV-01-0353-PHX-ROS
AMENDED ORDER

Pending before the Court are Defendant Fred Meyers Stores, Inc.'s ("Fred Meyers") Motion for Partial Judgment on the Pleadings (Doc. #15), Plaintiff's Request for Leave of Court to Amend Complaint (Doc. #16), and Plaintiff's Motion to Continue Plaintiff's Response to Defendant's Motion for Partial Judgment on the Pleadings (Doc. #19). For the reasons set forth below, the Court will: (1) grant Plaintiff's Request for Leave of Court to Amend Complaint; (2) deny as moot Plaintiff's Motion to Continue Plaintiff's Response to Defendant's Motion for Partial Judgment on the Pleadings; and (3) grant Fred Meyers' Motion for Partial Judgment on the Pleadings.

Factual Background

Plaintiff Kerry Robinson was hired by Smitty's Super Value in December 1987. (Plaintiff's Second Amended Complaint ("SAC") ¶ 18). Through a series of mergers with other companies, Robinson was ultimately employed by Fred Meyers as a cashier during the

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1 period in question. (SAC ¶¶ 18-22). Plaintiff was employed under, and subject to, the terms
2 of a collective bargaining agreement ("Fred Meyers CBA") during her entire term of
3 employment with the various companies, from December 1997 until her termination on
4 November 5, 1999. (Id. ¶ 22). The Fred Meyers CBA terms regarding substance abuse were
5 effective during the period in question, which Plaintiff agrees governed her employment.
6 (Id.)

7 On October 21, 1999, supervisory personnel at Fred Meyers summoned Plaintiff to
8 the store security office and instructed her to go to a local medical center. (SAC ¶¶ 24-25).
9 It was explained to Plaintiff that she was being sent there for the purpose of providing the
10 medical center staff with a urine sample for drug and alcohol testing. (Id.). Plaintiff
11 objected to the test, asserting that it was unwarranted and in violation of her rights.
12 (Id. ¶ 26). Plaintiff alleges that in the same meeting, Fred Meyers' managers "probed her
13 personal beliefs, her attitudes toward her person, her bodily functions, and her right to
14 privacy." (Id.). She eventually provided the necessary sample, which allegedly indicated
15 drug use. (Id. ¶¶ 27-30). On November 5, 1999, Fred Meyers terminated Plaintiff.
16 (Id. ¶¶ 30, 42).

17 In her Complaint, Plaintiff alleges that she did not then and does not now take drugs.
18 (SAC ¶ 33). She argues that decongestant medication could have accounted for the traces
19 of amphetamines found in the sample. (Id. ¶ 35). Furthermore, Plaintiff alleges that Fred
20 Meyers' substance abuse policy differed from that of Smitty's and her other previous
21 employers. (Id. ¶ 37). The terms of the previous policies purportedly called for a 30-day
22 suspension for the same violation, with continued random drug testing of the violator upon
23 reinstatement. (Id.). Plaintiff also objects to the alleged protracted process of disclosure of
24 the results of the drug test after her termination. (Id. ¶¶ 31-32).

25 Plaintiff filed a grievance with the United Food & Commercial Workers Local
26 Union 99 ("Union") for a wrongful discharge in violation of the Fred Myers CBA, and the
27 Union responded to her grievance through its normal processes. (SAC ¶ 44). The pleadings
28 do not indicate what was the outcome of the initial grievance process, but a subsequent

communication from the Union suggests that her grievance was denied. (See 12/15/00 Union Resp. Letter, attached to Doc. #30). Plaintiff appealed that decision on October 2, 2000. (Id.). On December 15, 2000, the Union's Executive Board declined to pursue Plaintiff's grievance to arbitration, and she then filed the instant action. (Id.).

Procedural History

On February 23, 2001, Plaintiff filed a Complaint (Doc. #1) against Fred Meyers, alleging the following nine claims: (1) sex discrimination; (2) wrongful termination in violation of public policy; (3) breach of implied covenant of good faith and fair dealing; (4) invasion of privacy; (5) intentional infliction of emotional distress; (6) a second count of intentional infliction of emotional distress; (7) breach of contract; (8) breach of duty of fair representation; and (9) violation of due process. On March 26, 2001, Plaintiff filed an Amended Complaint (Doc. # 2) adding Union as a defendant.

Union filed an Answer (Doc. #5) to Plaintiff's Amended Complaint on April 23, 2001. Fred Meyers filed an Answer (Doc. #6) to Plaintiff's Amended Complaint on April 27, 2001. On July 25, 2001, Fred Meyers filed a Motion for Partial Judgment on the Pleadings ("Rule 12(c) Motion") (Doc. #15), seeking dismissal of all of Plaintiff's state law claims.

Plaintiff requested leave of Court to file a Second Amended Complaint on July 27, 2001.¹ Fred Meyers filed a Response (Doc. #18) on August 8, 2001, opposing the filing, but requesting that its Rule 12(c) Motion be considered as directed toward the Second Amended Complaint should the Court grant Plaintiff leave to amend. (Resp. at 1).

On August 17, 2001, Plaintiff filed a Motion to Continue Plaintiff's Response to Defendant's Motion for Partial Judgment on the Pleadings ("Rule 56(f) Motion") (Doc. #19)²

¹In her Second Amended Complaint, Plaintiff deleted one intentional infliction of emotional distress claim and the due process claim, leaving a total of seven claims.

²Plaintiff urges in her Rule 56(f) Motion that additional discovery, to allow for production of the Fred Myer CBA, is required for Plaintiff to adequately respond to Fred Meyers' Rule 12(c) Motion. Plaintiff implicitly argues that such an inquiry would go beyond the pleadings and would convert the Rule 12(c) Motion into one for summary judgment

1 with an accompanying affidavit sworn by counsel for Plaintiff (Doc. #20). Plaintiff sought
2 the continuance of her time to respond to allow for discovery of the Fred Meyers CBA
3 pursuant to Fed. R. Civ. P. 56(f). On September 4, 2001, Fred Meyers filed an Opposition
4 (Doc. #21) to Plaintiff's Rule 56(f) Motion alleging that no discovery was necessary because
5 the motion could be resolved solely on the pleadings. (Opp'n at 1). On September 16, 2001,
6 Plaintiff filed a Reply (Doc. #24), and after receiving a copy of the Fred Meyers CBA, she
7 filed Plaintiff's Response to Defendant's Motion for Partial Judgment on the Pleadings
8 (Doc. #30).

9 Discussion

10 I. PLAINTIFF'S REQUEST FOR LEAVE OF COURT TO AMEND 11 COMPLAINT

12 Pursuant to Fed. R. Civ. P. 15(a), Plaintiff filed a Request for Leave of Court to
13 Amend Complaint ("Motion to Amend"), seeking to amend her Amended Complaint. A
14 party may amend a complaint with the written consent of the adverse party or, in the
15 alternative, by leave of the court. Fed. R. Civ. P. 15(a). "Leave to amend shall be freely
16 given when justice requires." *Id.* Fred Meyers does not oppose Plaintiff's filing of a second
17 amended complaint so long as the Court will consider its Rule 12(c) Motion as directed at
18 that complaint. (Def.'s Resp. at 1). Union did not respond to Plaintiff's Motion to Amend.

19
20 pursuant to Rule 56. Rule 12(c) and 12(b) motions are "functionally identical" and,
21 therefore, the same standards are generally applicable to Rule 12(c) motions as are applicable
22 to Rule 12(b) motions. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir.
23 1988). When material outside the pleadings is considered, a 12(c) motion is converted to one
24 for summary judgment. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1543,
25 1555 n.19 (9th Cir. 1990) (applying this conversion standard to a rule 12(b)(6) motion). The
26 Ninth Circuit has specifically held that a document is not considered "outside" the pleadings
27 "if the complaint specifically refers to the document and if its authenticity is not questioned."
28 *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). Here, Plaintiff's Second Amended
Complaint makes specific reference to the collective bargaining agreement, and neither party
has questioned the authenticity of the agreement as the one appropriately governing the
conduct in question. (See, e.g., SAC ¶¶ 22, 37, 40, 43-45). As such, reference to and usage
of the Fred Myers CBA does not convert Fred Meyers' Rule 12(c) Motion into one for
summary judgment.

Given Fred Meyers' conditional lack of opposition, Union's failure to respond,³ and the strong policy of deciding cases on their merits, see Martinez v. Newport Beach City, 125 F.3d 777, 785 (9th Cir. 1997), the Court will grant Plaintiff's Motion to Amend. In addition, the Court will consider Fred Meyers' Rule 12(c) Motion as directed toward Plaintiff's Second Amended Complaint.

II. PLAINTIFF'S MOTION TO CONTINUE PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

On August 17, 2001, Plaintiff filed a Motion to Continue Plaintiff's Response to Defendant's Motion for Partial Judgment on the Pleadings ("Rule 56(f) Motion"). In that motion, Plaintiff sought a continuance to provide time for discovery of the Fred Meyers CBA, arguing that it was indispensable to Plaintiff's ability to properly fashion a response to Fred Meyers' Rule 12(c) Motion. (Patterson Aff. ¶¶ 2-4). A copy of the actual Fred Meyers CBA was not provided to the Plaintiff at any time prior to the request for continuance. After Plaintiff filed her Rule 56(f) Motion, however, Fred Meyers provided a copy of the CBA to Plaintiff and notified the Court of its production (Doc. #28). Plaintiff did not base her Rule 56(f) Motion on the need for any other documents or information, and she filed a Response (Doc. #30) to Fred Meyers' 12(c) Motion once Fred Meyers produced the CBA. Thus, the Court will deny as moot Plaintiff's Rule 56(f) Motion.

III. FRED MEYERS' RULE 12(c) MOTION

On July 25, 2001, Fred Meyers filed its Rule 12(c) Motion. Assuming the truthfulness of all material facts alleged in Plaintiff's Second Amended Complaint and drawing all reasonable inferences in Plaintiff's favor, see Fed. R. Civ. P. 12(c) and General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989), the Court finds that Fred Meyers' Rule 12(c) Motion should be granted regarding Plaintiff's second through sixth causes of action. Plaintiff's first cause

³See Rules of Practice of the United States District Court for the District of Arizona, Rule 1.10(i).

of action, a Title VII sex discrimination claim, and her “eighth” cause of action, a breach of the duty of fair representation claim, remain unaffected by Fred Meyers’ Rule 12(c) Motion.⁴

A. Preemption Under Section 301 of the Labor Management Relations Act

In its Rule 12(c) Motion, Fred Meyers argues that Plaintiff’s second through sixth causes of action are state law claims, preempted by Section 301 of the Labor Management Relations Act (“Section 301”), 29 U.S.C. § 185.⁵ See Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). However, Plaintiff correctly argues that a state law claim is only preempted by Section 301 where its resolution requires the *interpretation of*, as opposed to merely a *reference to*, a collective bargaining agreement. (Pl.’s Resp. at 2) (citing Lingle v. Norge, 486 U.S. 399 (1988)) (emphasis added).

In Cramer v. Consolidated Freightways Inc., 255 F.3d 683 (9th Cir. 2001), the Ninth Circuit set forth the appropriate considerations for determining whether a state law claim *interprets* or merely *refers to* a collective bargaining agreement, which is dispositive of the preemption question.⁶ In Cramer, the Ninth Circuit considered whether state law claims for invasion of privacy and intentional infliction of emotional distress were preempted under Section 301. The defendant employer had placed video cameras and audio listening devices behind two-way mirrors in the restrooms to detect drug use by employees. The surveillance equipment was later discovered by an employee. The affected employees’ work arrangement

⁴In Plaintiff’s Second Amended Complaint, there is no “seventh” cause of action even though there is a “sixth” and an “eighth” cause of action. Plaintiff’s “eighth” cause of action for breach of the duty of fair representation will hereafter be considered as the “seventh” cause of action in the Second Amended Complaint.

⁵Applying the 180-day statute of limitations for Section 301, Fred Meyers maintains that Plaintiff’s claims are time barred. The Court need not reach this issue because the state law claims will be dismissed on preemption grounds.

⁶The Cramer opinion was amended on August 27, 2001, making two minor textual changes that do not affect the disposition of this case. 2001 U.S. App. LEXIS 19157 (9th Cir. 2001).

1 was governed by a collective bargaining agreement, which included provisions for the use
2 of video surveillance.

3 Numerous employees, along with certain others affected by the surveillance, filed a
4 class action in state court seeking damages and an injunction from further use of the
5 surveillance equipment. The defendant employer removed the action to federal court and
6 sought dismissal of all the state law claims under Section 301. The district court dismissed
7 the state claims, finding that Section 301 preempted the claims.⁷

8 The Ninth Circuit disagreed with the district court's finding of Section 301
9 preemption and reversed, holding that the collective bargaining agreement could not have
10 "contemplate[d] the surreptitious videotaping plaintiff's challenge[d] in their state law claims
11 . . . [because] § 301 does not grant the parties . . . the ability to contract for what is illegal
12 under state law." Cramer, 255 F.3d at 694-95. In attempting to clarify its position on the
13 question of Section 301 preemption and narrowing the scope of preemption suggested by
14 previous cases, the court reviewed Allis-Chalmers, Lingle, and Livadas v. Bradshaw, 512
15 U.S. 107 (1994). From these decisions, the court found the common principle that a claim
16 is not preempted by Section 301 where "the legal character of a claim [is] 'independent' of
17 rights under the collective bargaining agreement . . . [and] the bare fact that a collective
18 bargaining agreement will be consulted" does not extinguish the claim. Id. at 690-91. The
19 court noted that the "demarcation between preempted claims and those that survive § 301's
20 reach is not . . . a line that lends itself to analytical precision." Id. at 691. However, the
21 court further explained that its analysis was intended to clarify existing United States
22 Supreme Court precedent in order to "guide [courts and litigants] through the analytical
23 thicket." Id.

24 Where a claim involves the "employer's alleged failure to comport with its
25 contractually established duties," it is preempted. Id. However, "if the claim may be
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27 ⁷There were several members of the class who were not employees, and their claims
28 were remanded because they were not subject to Section 301 preemption.

litigated without reference to rights and duties established” in a collective bargaining agreement, it is not preempted. Id. Thus, “the plaintiff’s claim is the touchstone for this analysis . . . [and] the need to interpret the CBA must inhere in the nature of the plaintiff’s claim.” Id. The court was careful to distinguish a bona fide connection between the claim and the collective bargaining agreement and one where the link between the two was “creative” at best.⁸ Id. at 692. The court adopted a standard that the argument for the connection “must reach a reasonable level of credibility.” Id.

The Cramer court also limited the scope of several of its earlier, arguably more expansive, holdings. The Ninth Circuit’s earlier jurisprudence suggested that Section 301 preempted anything that was “a properly negotiable subject” for collective bargaining, as well as anything that was a “working condition whether or not it is specifically discussed in the [collective bargaining agreement].” Id. at 692 (citing Utility Workers of Am., Local No. 246 v. Southern Cal. Edison, Co., 852 F.2d 1083 (9th Cir. 1988) and Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988)). The court indicated that such an expansive reading of the Section 301 preemptive power was contrary to the United States Supreme Court’s caution in Livadas and Lingle against sweeping interpretations of Section 301.⁹ Id. at 693.

The ultimate standard formulated by the Cramer court, in light of the narrowing of earlier Ninth Circuit case law, is that “[a] state law claim is not preempted under § 301 unless

⁸The majority characterized the assertions of the dissent as “strain[ing] credulity.” The dissent’s argument was characterized as asserting that, where the collective bargaining agreement included terms which permitted video surveillance, its silence on the use of video cameras behind two-way mirrors could be read to suggest implied consent. Such a possibility, therefore, required interpretation of the collective bargaining agreement to determine whether implied consent was given under its terms. Id. at 692, n.3. The majority reasoned that, because the conduct was illegal and could not be contracted away, such an interpretation was clearly unnecessary. Id.

⁹The court did note that many of the same cases may have reached the correct result if they had applied the new standard. Id. at 696. The court also noted that such a determination was “irrelevant to the question before [it]” because the court found that any provision allowing video surveillance in restrooms was illegal, even if it were bargained for in a collective bargaining agreement. Id.

1 it necessarily requires the court to *interpret* an existing provision of a CBA that can
2 reasonably be said to be relevant to the resolution of the dispute.” *Id.* (emphasis added). The
3 Cramer standard can be divided into four parts for use in determining whether a claim is
4 preempted by Section 301. First, the claim must be brought under state law. Second, the
5 claim must implicate an existing provision of the collective bargaining agreement. Third, the
6 court must be required to *interpret*, as opposed to merely *refer to*, the collective bargaining
7 agreement. Fourth, the interpretation of the claim must be reasonably relevant to the
8 resolution of the dispute and not merely a “creative linkage” bestowing preemption.
9 *Id.* at 692, n.3.

10 **B. Plaintiff’s Causes of Action Preempted under Section 301**

11 **1. Plaintiff’s second cause of action for violation of A.R.S. § 23-493**

12 In her second cause of action, Plaintiff alleges that Defendants violated
13 A.R.S. § 23-493, which addresses employers’ drug testing of employees. Fred Meyers
14 correctly asserts that A.R.S. § 23-492.06 specifically shields an employer from liability where
15 the employer initiates a drug testing policy in accordance with the statute. (Mot. at 3-4). The
16 Plaintiff alleges, however, that the specific requirements set forth in A.R.S. § 23-493.04 were
17 not met, and such a failure resulted in damages for loss of income and benefits.
18 (SAC ¶¶ 2-3).

19 Section 23-493.10 provides that an employer who follows a drug testing policy
20 negotiated as part of a collective bargaining agreement is entitled to “receive the full benefits
21 of this article, even if that policy does not conform to all of the provisions of this article.”
22 Furthermore, section 23-493.08(c) indicates that “compliance with this article by employers
23 is voluntary and no cause of action arises” where the employer’s drug testing policy does not
24 comply with the terms of section 23-493. The Court, however, need not reach the issue of
25 whether this claim is viable under the terms of the cited provisions of the statute because it
26 must be dismissed on preemption grounds.

27 Applying the Cramer standard for preemption, Plaintiff’s second cause of action is
28 clearly being brought under a state statute, and Article Three, subsection (p) of the Fred

1 Meyers CBA adopts by reference the substance abuse policy of the employer.¹⁰ Thus, the
2 claim that Fred Meyers' managers violated this policy implicates the same provision of the
3 Fred Meyers CBA. Next, the terms of Fred Meyers' substance abuse policy are binding on
4 the parties and define the scope of the duties between Fred Meyers and Plaintiff with respect
5 to drug testing. Even if section 23-493 provides a cause of action for violation of its terms,
6 which is not apparent, the statute provides that the terms of a collective bargaining agreement
7 will control where one exists.¹¹ Because the terms of section 23-493 allow a collective
8 bargaining agreement drug testing policy to control, the claim that Defendants violated the
9 statute in the administration of its drug testing policy requires *interpretation* of the Fred
10 Meyers CBA. See Cramer, 233 F.3d at 693. Finally, such a violation is reasonably relevant
11 to the determination of the claim because even the statute that Plaintiff argues should provide
12 her relief defers to the substance abuse terms of the CBA. (SAC ¶¶ 52-56). Contrary to the
13 facts in Cramer, not only are the actions in question under A.R.S. § 23-493 not independently
14 illegal under state law, but the notes preceding the statute expressly indicate that the state
15 favors drug testing and the implementation of drug testing programs because "[t]he abuse of
16 illegal drugs . . . is a matter of substantial public concern." A.R.S. § 23-493, Historical and
17 Statutory Notes.

18 The Court will dismiss Plaintiff's second cause of action for violation of A.R.S.
19 § 23-493 because the Cramer standard for preemption has been met.

22 ¹⁰The parties have not provided a copy of Fred Meyers' substance abuse policy, but
23 the Fred Meyers CBA specifically explains that the policy was set forth and adopted "as per
24 previous agreement." Thus, the language of the substance abuse policy is incorporated into
25 the Fred Meyers CBA.

26 ¹¹The protections of the statute indicate that such collective bargaining agreements are
27 "valid and enforceable, notwithstanding the provisions of the article." A.R.S. § 23-493.10.
28 Thus, the statute provides additional liability protection where the employer, with a drug
testing policy entered into by way of a collective bargaining agreement, follows an
established drug testing policy.

2. **Plaintiff's third cause of action for breach of implied covenant of good faith and fair dealing and sixth cause of action for breach of contract**

Plaintiff argues, in her third and sixth causes of action, that Defendants breached duties of good faith and fair dealing and breached contracts with her. (SAC ¶¶ 57-66, 76-78). Plaintiff argues that a claim for breach of the covenant of good faith and fair dealing does not require interpretation of the Fred Meyers CBA because the common law elements for breach of the covenant of good faith are clear and require no reference to the CBA. (Pl.'s Resp. at 3). Regarding her breach of contract claim, Plaintiff argues that Defendants engaged in unfair labor practices. (*Id.* at 6).

Again, Ninth Circuit and United States Supreme Court precedent hold that claims which are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor agreement" are preempted by Section 301. Allis-Chalmers, 471 U.S. at 220; Cramer, 255 F.3d at 689 (quoting Allis-Chalmers). Furthermore, the United States Supreme Court precedent holds that federal common law preempts state contract law in the interpretation and enforcement of collective bargaining agreements. See Textile Workers Union v. Lincoln Mills, 353 U.S. 488 (1957). In International Brotherhood of Electrical Workers v. Hechler, 481 U.S. 851 (1987), the Supreme Court pointed out that if state law "were allowed to determine the meaning of particular contract phrases or terms in a collective bargaining agreement . . . the 'parties would be uncertain as to what they were binding themselves to' in a collective bargaining agreement, and, as a result, 'it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.'" *Id.* at 858 (quoting Allis-Chalmers, 471 U.S. at 211).

The claims not dismissed as preempted in Cramer were held to be independent of the collective bargaining agreement because state law provided that such conduct was illegal and the collective bargaining agreement had no power to overcome this illegality. 255 F.3d at 697. However, the ability of parties to bargain for legally negotiable terms is well established, particularly in the collective bargaining process. See NLRB v. Allis-Chalmers Mfg. Co., 338 U.S. 175 (1967); Hollins v. Kaiser Found. Hosp., 727 F.2d 823 (9th Cir.

1 1984). In Allis-Chalmers, the Court found a state law claim of bad faith in the payment of
2 disability benefits preempted by Section 301. 471 U.S. at 202. Other Ninth Circuit cases
3 have similarly held that contract claims were preempted. See e.g., Harris v. Aulmax Mill
4 Prods., 897 F.2d 400 (9th Cir. 1990) (covenant of good faith and fair dealing covered by
5 collective bargaining agreement preempted); Young v. Anthony's Fish Grottos, 830 F.2d 993
6 (9th Cir. 1987) (breach of contract and good faith claims preempted by Section 301). Thus,
7 unless there is an independent, illegal provision binding the parties, as in Cramer, or the
8 terms of the collective bargaining agreement do not address the conduct in question, contract
9 claims arising out the collective bargaining agreement are clearly preempted by Section 301.

10 The Cramer standard applies to Plaintiff's third and sixth causes of action as follows:
11 First, both the breach of the duty of good faith and fair dealing claim and the breach of
12 contract claim are brought under state common law principles. Plaintiff's Second Amended
13 Complaint clearly states that "the law of the state of Arizona implied a covenant of good faith
14 and fair dealing." (SAC ¶ 58). The same language is incorporated by reference into the
15 breach of contract claim. (Id. ¶ 79).

16 Second, the claims not only implicate specific provisions of the Fred Meyers CBA,
17 but implicate the *entire* Fred Meyers CBA. The substance of these claims must be
18 determined by the very language of the Fred Meyers CBA and are inextricably intertwined
19 with the entire agreement. This is clear despite Plaintiff's assertion that no interpretation of
20 the Fred Meyers CBA is required. (Pl.'s Resp. at 3, 6). Indeed, Plaintiff's Second Amended
21 Complaint belies this assertion because it cites the rule for duty of good faith as including
22 good faith "in all matters related to the employment," fairness "in all matters related to
23 employment," compliance with Defendant's own policies and rules, and termination only for
24 cause. (SAC ¶ 58). Each of these duties, and the scope thereof, are defined by the express
25 provisions of the Fred Meyers CBA.

26 Third, it is clear that *mere reference* to the Fred Meyers CBA will not provide
27 sufficient information to determine the scope of the employment relationship in the
28 contractual context. See Cramer, 233 F.3d at 693. Several examples of provisions which

will require interpretation of the Fred Myers CBA before a determination of bad faith or breach of contract can be reached are: (1) whether Plaintiff's conduct constituted sufficient "cause" for termination under the terms of the CBA; (2) whether the drug testing policies approved by the CBA were followed in the instant case; and (3) whether the CBA substance abuse policy provides for the type of questioning alleged in Plaintiff's Second Amended Complaint. The Court must explicitly *interpret* the Fred Myers CBA to answer these questions, and the CBA provides a sufficient basis for a fair determination of these questions. Thus, this exercise would require more than a *mere reference* to the Fred Myers CBA. *Id.*

Finally, the contract claims alleged against Defendants are fundamentally relevant to the resolution of the dispute on these claims because they find their entire existence in the Fred Myers CBA.

The Court will dismiss Plaintiff's third and sixth causes of action because the Cramer standard for preemption has been met.

3. Plaintiff's fourth cause of action for invasion of privacy and fifth cause of action for intentional infliction of emotional distress

Plaintiff alleges in her fourth and fifth causes of action that Defendants violated her right to privacy and intentionally inflicted emotional distress upon her by requiring her to submit to a drug screening. (SAC ¶¶ 67-75). Plaintiff alleges that she was required to provide a urine sample and was subjected to a lengthy interview by Fred Meyers' managers that covered inappropriate and personally disturbing subjects. (*Id.* ¶ 71). In addition, Plaintiff alleges that these intrusions were conducted without proper notice or consent and with wanton disregard for any harm which might result from them. (*Id.* ¶ 73).

Arizona recognizes both invasion of privacy claims and claims for intentional infliction of emotional distress. See Savage v. Boies, 272 P.2d 349 (Ariz. 1954) (recognizing intentional infliction of emotional distress claim); Reed v. Real Detective Pub. Co., 162 P.2d 133 (1945) (recognizing invasion of privacy claim). The test for the two is the same and is adopted from the standard set forth in the Restatement (Second) of Torts § 46, comment d:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

See Rutledge v. Phoenix Newspapers, Inc., 715 P.2d 1243, 1244 (Ariz. Ct. App. 1986); Davis v. First Nat'l Bank, 605 P.2d 37 (Ariz. Ct. App. 1979); Cluff v. Farmers Ins. Exch., 460 P.2d 666 (Ariz. Ct. App. 1969) (incorporating requirements of claim for intentional infliction of emotional distress into action for invasion of privacy based upon intrusion into plaintiff's seclusion or solitude).

For two reasons, these causes of action provide no recourse for Plaintiff apart from those which might be provided to her within the provisions of the Fred Meyers CBA. First, in Hart v. Seven Resorts, Inc., 947 P.2d 846 (Ariz. App. 1997), the court held that though a broad right to privacy exists, "it applies only to intrusions by *the government* or where there is 'state action.'" Id. at 850-51 (emphasis in original). Thus, there must be state action for a cause of action of privacy infringement to exist under Arizona law. Second, in Weller v. Arizona Department of Economic Security, 860 P.2d 487 (Ariz. Ct. App. 1993), the court held that though an employee discharged for a positive drug test may be entitled to unemployment benefits, the court did not intend its decision to be read as "requiring employers to retain workers who abuse drugs. The Legislature has not precluded employers from terminating employees who use drugs either on or off the job." Id. at 491. Thus, there is not a per se rule in Arizona precluding drug-related terminations.

Therefore, if a cause of action lies for extreme and outrageous conduct related to the enforcement of the Fred Meyers substance abuse policy, it must arise from the terms of the Fred Meyers CBA. The court explained in Weller that, for purposes of drug testing in the employment relationship, "an employee agrees to abide by the rules of his employer as a condition of employment." 860 P.2d at 491. A claim, therefore, will lie only where the Fred Meyers CBA confers an expectation of a certain level of privacy or protection against extreme and outrageous conduct in implementing its substance abuse policy.

1 The Cramer standard applies to Plaintiff's fourth and fifth causes of action as follows:
2 First, the intentional infliction of emotional distress and invasion of privacy claims are
3 Arizona common law causes of action. (SAC ¶¶ 67, 72).

4 Second, the claims implicate the substance abuse policy of the Fred Meyers CBA.
5 This is so because Defendants' conduct can only be deemed extreme and outrageous in the
6 context of the procedure bargained for under the terms of the Fred Meyers CBA. Where the
7 substance abuse policy contains a requirement that the employee submit to a random drug
8 test (which Plaintiff's pleading suggests it does, see SAC ¶¶ 18-45), whether Defendants'
9 conduct in the implementation of that procedure was extreme and outrageous can only be
10 determined in the context of the substance abuse policy and procedures adopted by the Fred
11 Meyers CBA. A suit alleging an extreme and outrageous violation of these bargained for
12 procedures clearly implicates the substance abuse provisions of the Fred Meyers CBA.

13 Third, the Court will be required to interpret the terms of the substance abuse policy
14 in the Fred Meyers CBA to determine whether the actions alleged by Plaintiff were extreme
15 and outrageous in relationship to the procedures to which Plaintiff agreed under the terms
16 of the CBA. More than a mere reference to the Fred Meyers CBA will be required in
17 making such a determination.

18 Finally, the interpretation of the Fred Meyers CBA is not simply relevant to the
19 resolution of the intentional infliction of emotional distress and invasion of privacy claims,
20 but is fundamental to any determination in favor of either party. Without interpreting the
21 terms of the Fred Meyers CBA, it will be impossible to determine if Defendants' conduct
22 was extreme and outrageous in view of the substance abuse policy that was agreed to in the
23 collective bargaining process. Furthermore, as is clear from the public policy statement in
24 A.R.S. § 23-493, there is no illegality if union members, who are parties to a collective
25 bargaining agreement, agree to abide by an employer's substance abuse policy.

26 The Court will dismiss Plaintiff's fourth and fifth causes of action because the Cramer
27 standard for preemption has been met.
28

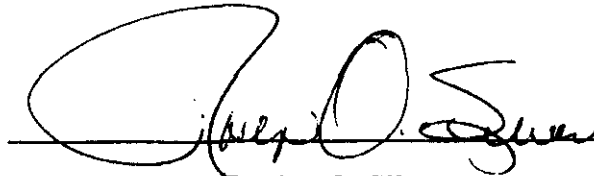
1 **IT IS THEREFORE ORDERED** that Plaintiff's Request for Leave of Court to
2 Amend Complaint (Doc. #16) is **GRANTED**. The Clerk of the Court is directed to file
3 Plaintiff's Second Amended Complaint, which was lodged with the Court on July 27, 2001
4 when Plaintiff filed her Request for Leave of Court to Amend Complaint.

5 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Continue Plaintiff's
6 Response to Defendant's Motion for Partial Judgment on the Pleadings (Doc. #19) is
7 **DENIED** as moot.

8 **IT IS FURTHER ORDERED** that Defendant's Motion for Partial Judgment on the
9 Pleadings (Doc. #15) is **GRANTED**.

10 DATED this 9 day of July 2002.

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A handwritten signature in black ink, appearing to read 'Roslyn O. Silver', is written over a horizontal line.

Roslyn O. Silver
United States District Judge